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Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARTIN K. MAURER, PETITIONER

v.

CALIFORNIA BOARD OF PRISON TERMS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

MARTIN K. MAURER, C-02917
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QUESTIONS PRESENTED FOR REVIEW

1. Whether California statutory language creates an expectation of release on parole worthy of protection by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether California official administrative regulations violate concepts of due process of law by risking the continual incarceration of life term prisoners beyond the uniform terms established for offenses of similar gravity and magnitude?

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OPINION BELOW

The opinion of the California Board of Prison Terms (App. A)[1] was never published in an official or unofficial report. Likewise, the California Superior (App. B), California Appellate (App. C), and the California Supreme Court (App. D) decisions were never published in any such reports.

JURISDICTION

The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. § 1257 following a final judgment rendered by the California Supreme Court

> "where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution ... [and] where any ... right ... is specially set up or claimed under the constitution...." Id.

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1. "App." refers to attached Appendix.

STATUTES AND REGULATIONS INVOLVED

Section 3041 of Article 3 of Chapter 8 of Title 1 of Part 3 of the Penal Code of California:

> "(a) In the case of any prisoner sentenced pursuant to any provision of law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Prison Terms shall meet with each such inmate during the third year of incarceration for the purpose of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding post/conviction credit. One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two commissioners of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the prisoner

was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole to the full board for an en banc hearing. In case of such a review, a majority vote of the full Board of Prison Terms in favor of parole is required to grant parole to any prisoner.

"(b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

"(c) For the purpose of reviewing the suitability for parole of those prisoners eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each such prisoner until such time as the person is released pursuant to such proceedings or reaches the expiration of his term calculated under Section 1170.2." Cal. Stat. 1986, ch. 1446, § 3.

Section 3041.5 of Article 3 of Chapter 8 of Title 1 of Part 3 of the Penal Code of California:

> "(a) At all hearings for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing or rescinding of parole dates:
>
> "(1) At least 10 days prior to any hearing by the Board of Prison Terms, the prisoner shall be permitted to review his or her file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in such file.
>
> "(2) The prisoner shall be permitted to be present, to ask and answer questions and to speak on his own behalf.
>
> "(3) Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.
>
> "(4) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.
>
> "(5) If the hearing is for the purpose of postponing or rescinding of parole dates, the prisoner will have rights set forth in paragraphs (3) and (4) of subdivision (c) of

Section 2932.

"(b)(1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of failure to meet such conditions.

"(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.

"The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than (A) two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the basis for the finding or, (B) three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the basis for the finding.

"(3) Within 10 days of any board

action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for such action and shall offer the prisoner an opportunity for review of such action.

"(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for that action and shall schedule the prisoner's next hearing within 12 months and in accordance with paragraph (2). Cal. Stat. 1986, ch. 248, § 166.

Section 2280 of Article 5 of Chapter 3 of Division 2 of Title 15 of the California Code of Regulations:

"A life term prisoner shall be considered for parole for the first time at the initial parole consideration hearing. At this hearing, a parole date shall be denied if the prisoner is found to be unsuitable for parole under § 2281(c). A parole date shall be set if the prisoner is found to be suitable for parole under § 2281(d). A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude in respect to the threat to the public. In setting the parole date, the panel shall consider the

Sentencing Rules for the Superior Courts as they specifically relate to life prisoners. The panel shall also consider the criteria and guidelines set forth in this article for determining the suitability for parole and the setting of parole dates, considering the number of victims of the crime for which the prisoner was sentenced and any other circumstances in mitigation or aggravation." Cal. Admin. Register 79, No. 24, 1979.

Section 2281 of Article 5 of Chapter 3 of Division 2 of Title 15 of the California Code of Regulations:

"(a) General. The panel shall first determine whether a prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

"(b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's: social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses,

including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

"(c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

"(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

"(A) Multiple victims were attacked, injured or killed in the same or seperate incidents.

"(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

"(C) The victim was abused, defiled or mutilated during or after the offense.

"(D) The offense was carried out

in a manner which demonstrates an exceptionally callous disregard for human suffering.

"(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

"(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

"(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

"(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

"(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

"(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

"(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include:

"(1) No Juvenile Record. The prisoner does not have a record of

assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

"(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

"(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense.

"(4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress had built over a long period of time.

"(5) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

"(6) Age. The prisoner's present age reduces the probability of recidivism.

"(7) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

"(8) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release." Cal. Admin. Register 80, No. 18, 1980.

Section 2282 of Article 5 of Chapter 3 of Division 2 of Title 15 of the California Code of Regulations:

"(a) General. The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base offense, taking into account all of the circumstances of that crime. The base offense is the most serious of all life offenses for which the prisoner has been committed to prison.

"The base term shall be established by utilizing the appropriate matrix of base terms provided in this section for the base offense of which the prisoner was convicted. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

"If the panel finds circumstances in aggravation or in mitigation as provided in §§ 2283 or 2284, the panel may impose the upper or lower base term provided in the matrix, stating the specific reason for imposing such a term. A base term other than the upper, middle or lower base term provided in the matrix may be imposed by the panel if justified by the particular facts of the individual case.

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"(b) Matrix of Base Terms for First Degree Murder.

VICTIM	CIRCUMSTANCES				
	2282(b) *FIRST DEGREE MURDER* Penal Code § 189 (in years and does not include post conviction credit as provided in § 2290)	A. *Indirect* Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack; a crime partner actually did the killing.	B. *Direct or Victim Contribution* Death was almost immediate or resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.	C. *Severe Trauma* Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim.	D. *Torture* Victim was subjected to the prolonged infliction of physical pain through the use of nondeadly force prior to act resulting in death.
	I. *Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred; e.g., crime partner, drug dealer, etc.	8-10-12	10-12-14	11-13-15	13-15-17
	II. *Prior Relationship* Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. If victim had a personal relationship but prisoner hired and/or paid a person to commit the offense, see Category IV.	10-12-14	12-14-16	13-15-17	15-17-19
	III. *No Prior Relationship* Victim had little or no personal relationship with prisoner; or motivation for act resulting in death was related to the accomplishment of another crime; e.g., death of victim during robbery, rape, or other felony.	11-13-15	13-15-17	14-16-18	16-18-20
	IV. *Threat to Public Order or Murder for Hire* The act resulting in the victim's death constituted a threat to the public order include the murder of a police officer, prison guard, public official, fellow patient or prisoner, any killing within an institution, or any killing where the prisoner hired and/or paid another person to commit the offense.	13-15-17	15-17-19	16-18-20	18-20-22
		SUGGESTED BASE TERM			

"(c) Matrix for Kidnapping for Robbery or Ransom.

CIRCUMSTANCES

VICTIM	2282(c) *KIDNAP FOR ROBBERY OR RANSOM* Penal Code § 209 (in years and does not include post conviction credit provided in § 2290)	A. *Minor Movement* Movement was of short duration and resultant location would not substantially increase risk of harm.	B. *Extensive Movement* Movement was of lengthy duration or resultant location would substantially increase risk of harm.	C. *Hostage* Victim was taken as hostage.	D. *Planning* The crime involved intricate prior planning.
	I. *Minor Injury* Victim unharmed or received minor injury.	8-10-12	9-11-13	10-12-14	11-13-15
	II. *Victim Assaulted* Victim was sexually assaulted or otherwise seriously injured or assaulted.	9-11-13	10-12-14	11-13-15	12-14-16
	III. *Major Injury* Victim's major injuries required extensive treatment or the victim was seriously disabled.	10-12-14	11-13-15	12-14-16	13-15-17
	IV *Death* Victim died.	Use matrix provided in Section 2282(b).			

SUGGESTED BASE TERMS

"(d) Matrix for Other Life Crimes. In considering crimes for which no matrix is provided, the panel shall impose a base term by comparison to offenses of similar gravity and magnitude in respect to the threat to the public, and shall consider any relevant Judicial Council rules and sentencing information as well as any circumstances in aggravation or mitigation of the crime." Cal. Admin. Register 80, No. 18, 1980.

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STATEMENT OF THE CASE

On March 23, 1893 the California Legislature approved An Act To Establish Board of Parole Commissioners. Cal. Stat. 1893, ch. 153, § 1. This legislative action created, for the first time in California, a parole system. In particular, it established that:

> "The state Board of Prison Directors of this State shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned under a sentence other than for murder in the first or second degree, who may have served one calendar year of the term for which he was convicted, and who has not previously been convicted of a felony, and served a term in a penal institution, may be allowed to go upon parole outside of the buildings and inclosures ...." Id.

In 1913 California enacted parole legislation which removed the restriction against paroling prisoners sentenced for murder. Cal. Stat. 1913, ch. 591, § 1. California then enacted the Indterminate

Sentence Law (hereinafter referred to as ISL) in 1917. Cal. Stat. 1917, ch. 527, § 1. Under this legislation when a court imposed a prison sentence the term or duration of the period of incarceration was not fixed at the time of sentencing, but deferred to a later time where the

> "governing authority of the reformatory or prison ... shall determine after the expiration of the minimum term of imprisonment has expired what length of time, if any, such prisoner shall be confined ... and if it be determined that such prisoner ... be released before the expiration of the maximum period ... then such prisoner be released at such time as the governing authority may determine." Id.; see former Cal. Pen. Code § 1168(d) (1917).

In 1937 the California Legislature amended the ISL and created the Board of Prison Terms and Paroles to control and govern the release of prisoners. Cal. Stat. 1937, ch. 543, § 1; see former Cal. Pen. Code § 1168 (1937).

In 1941 the California Legislature

recodified the ISL and identified the Board of Prison Terms and Paroles' power

> "to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures." Cal. Stat. 1941, ch. 106, § 1; Cal. Stat. 1941, ch. 363, § 2; see former Cal. Pen. Code § 3040 (1941).

In 1944 the Board of Prison Terms and Paroles was abolished and the Adult Authority was created in its place. Cal. Stat. 3rd Extra Session 1944, ch. 2, § 1; see former Cal. Pen. Code § 5075 (1944).

In May of 1976 the Adult Authority published official administrative regulations which interpreted its own power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures. These regulations stated that:

> "No prisoner may be paroled until he is eligible for release on parole as provided by law.... Each inmate will be considered for parole at the initial term and parole hearing.... Each inmate will then be evaluated for suita-

> bility for release on parole. Those found to pose an unrealistic risk of danger to society will be denied parole.... All others will have a tentative parole release date established...." Cal. Admin. Register 76, No. 21, 1976; see former Cal. Admin. Code § 2250 (1976).[2]

Four examples were given to indicate unsuitability:

> "(a) History of violent acts on others. (b) History of forceable sexual attacks on others. (c) The presence of psychiatric or psychological condition relating to the inmate's criminality which create a high likelihood that new violent crimes will be committed. (d) A pattern of criminal behavior which is so persistent that substantial evidence of change for the better must be demonstrated." Cal. Admin. Register 76, No. 21, 1976; see former Cal. Admin. Code § 2301 (1976).

In 1975 the results of a comprehensive survey by Lipton, Martinson, and Wilks was published with regard to a large body of scientific research relating to correc-

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2. The California Administrative Code was renamed as the California Code of Regulations, effective January 1, 1988.

tional treatment programs.

> "This study uncovered no treatment that holds promiss of easily and effectively impacting upon the recidivism of all offenders. Instead, the findings of the survey indicate that treatments that are effective both in terms of reducing system costs and system recidivism rates are those that assist the offender to meet his immediate needs within his community of residence. (These needs may range from a subway token to medical services, family services, and advocacy services.) ... The problems surrounding the implication of community-oriented programming are somewhat less difficult to overcome by probation and parole agencies if they are willing to shift their focus from rehabilitating offenders by changing them to conform with some '"generally acceptable model of goodness"' to assisting the offender in adjusting to his particular problems in his particular community." Douglas Lipton, Robert Martinson, and Judith Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (Praeger special studies in U.S. economic, social, and political issues, New York, 1975), p. 560.

> "The entire body of research appears to justify only the conclusion that we do not now know of any program or method of rehabilitation that could be guaranteed to reduce

> the criminal activity of released offenders." National Academy of Sciences, "The Rehabilitation of Criminal Offenders: Problems and Prospects," Panel on Research on Rehabilitive Techniques, Committee on Research on Law Enforcement and Criminal Justice, Assembly of Behavioral and Social Sciences, National Research Council, Washington, D.C., 1979, p. 3.

The Lipton, Martinson, and Wilks publication

> "was widely interpreted as supporting the conclusion that '"nothing works'" in criminal rehabilitation. A conclusion fostered by Martinson in other writings and public appearances."[3] Id. at p. 4.

In 1977 the California Legislature found and declared that:

> "The purpose of imprisonment for crime is punishment. This purpose is best served for by terms proportionate to the seriousness of the offense with provisions for uniformity in the sentences of offenders committing the same offense under similar circumstances." Cal. Stat. 1977, ch. 165, § 15; Cal. Pen. Code § 1170(a)(1).

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3. See also Robert Martinson, "What Works? - Questions and Answers About Prison Reform," The Public Interest, Vol. 22, Spring 1974.

Provisions governing the setting and resetting of indeterminate terms were repealed and the Determinate Sentencing Law (hereinafter referred to as DSL) became effective on July 1, 1977. Cal. Stat. 1977, ch. 165, §§ 15, et seq. The DSL

> "generally substitutes for the indeterminate sentence law a system whereby the judge selects a term of imprisonment from three statutory choices with a new state agency administering revised provisions relating to sentences, good time credit and parole...." Legislative Council's Digest, Deering's Advance Legislative Service, Stat. 1976, ch. 1139, p. 301.

The court now fixes determinate terms for all offenses which formerly carried indeterminate terms and which had not been reduced to misdemeanors, except those with a maximum term of life. In setting a life term prisoner's release the legislature commanded the newly created Community Release Board to operate

> "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." Stat. 1977, ch. 165, § 45; see former Cal. Pen. Code § 3041 (1977).

In addition, this new law established that:

> "One year prior to the inmate's minimum eligible parole release date a panel consisting of at least three members of the Community Release Board shall meet with the inmate and shall normally set a parole release date ... unless it determines that the gravity of the current convicted offense or offenses or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Id.

A few days later, the Community Release Board promulgated detailed regulations covering the operation of parole consideration hearings for prisoners sentenced to a life term. Cal. Admin. Register 77, No. 28, 1977. These regulations included the

basis of §§ 2280, 2281 and 2282.

On February 23, 1979 the petitioner was sentenced by a California Superior Court to a life term of confinement in the state prison system. People v. Maurer, Los Angeles Super. Ct. No. A-340488.

On January 1, 1980 the Board of Prison Terms was substituted for the Community Release Board. Cal. Stat. 1979, ch. 255, §§ 1-63.

The petitioner became eligible for parole release on November 9, 1985 after serving a minimum of seven calendar years.

Sections 2280, 2281 and 2282 having previously been set forth herein, they will not be repeated here for the sake of brevity, except to note that they presently require a life term prisoner to be found suitable for release on parole before any consideration is given to the prisoner's uniform parole release date.

On February 13, 1986 the petitioner, as

an interested party, submitted a Petition To Amend the California Administrative Code to the Board of Prison Terms pursuant to Cal. Gov. Code § 11347. There it was claimed that §§ 2280, 2281 and 2282 were inconsistent with their underlying statutes and invalid because they required a finding of parole suitability prior to the setting of the prisoner's uniform parole release date. In particular, the petitioner claimed

> "that a life term prisoner is suitable for release on parole unless the state can establish that the prisoner, if released at the end of the term considered uniform for crimes of similar gravity and magnitude, would be a threat to the public safety." In re Maurer, Board of Prison Terms No. C-02917, Petition, p. 7.

On April 4, 1986 the Board of Prison Terms denied the petition to amend and stated that:

> "While the analysis of your petition is also consistent with the relevant statutory provisions, the board adopted regulations are con-

sistent and were properly adopted." Board of Prison Terms letter dated April 4, 1986. (App. A.)

On September 8, 1986 the petitioner filed a Petition For A Writ of Habeas Corpus in the California Superior Court, County of Monterey. In re Maurer, Monterey County Super. Ct. No. HC 1867. There the petitioner sought declaratory judgment against the Board of Prison Terms to the effect that (1) California prisoners sentenced to a life term have a fundamental right to recieve a uniform parole release date consistent with the gravity and circumstances of the commitment offense, and (2) §§ 2280, 2281 and 2282 violate concepts of due process of law by permitting disparate terms of imprisonment. Petition, supra, at pp. 68-78.

On October 14, 1986 the Superior Court dismissed the petition without a hearing even though no appearance was made by the Board of Prison Terms. The court did,

however, issue a short opinion. (App. B.)

On January 23, 1987 the petitioner filed in the California Court of Appeal, Sixth Appellate District, a Petition For A Writ of Habeas Corpus. In re Maurer, App. Ct. No. H002747. There the petitioner again raised federal questions by seeking declaratory judgments like those sought before the California Superior Court in No. HC 1867.

On February 11, 1987 the Court of Appeals dismissed the petition without an appearance by the Board of Prison Terms or a hearing. It did, however, issue a short opinion. (App. C.)

On August 31, 1987 the petitioner filed a Petition For A Writ of Habeas Corpus in the California Supreme Court. In re Maurer, Sup. Ct. No. S002196. There it was again argued that (1) life term prisoners possess statutorily created legitimate expectations of recieving a

parole release date sufficient to establish a fundamental liberty interest in parole under the Fourteenth Amendment to the United States Constitution, and (2) the parole release regulations run the risk of keeping prisoners imprisoned beyond the established uniform terms for offenses of similar gravity without any showing that the prisoner would be a danger to the public safety if released at the end of such uniform term. Petition, supra, at pp. 58-70.

On August 10, 1988 the California Supreme Court denied the petition without hearing and issued no opinion. (App. D.)

ARGUMENT

1. California Statutory Language Creates an Expectation of Release on Parole Worthy of Protection by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The petitioner contends that provisions of

§§ 3041 and 3041.5 of the Cal. Pen. Code creates a reasonable expectation for all life term prisoners to receive a non-disparate uniform term of incarceration and that such release dates may not be taken away by the state without the protections of the Due Process Clause of the Fourteenth Amendment. Furthermore, the highest court of the State of California has decided this federal question in a way which conflicts with the applicable decisions of this Court.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law...." U.S. Const., 14th Amend. Before the Due Process Clause comes into play, governmental deprivation of a person's liberty or property must be shown. Board of Regents v. Roth, 408 U.S. 564, 570-571, 92 S.Ct. 2701, 33 L.Ed.2d 548, 557 (1972). The application of this

clause to parole proceedings involves two questions. First, is a prisoner's interest in parole protected by the Fourteenth Amendment; and second, if it is, what specific procedures are required to assure due process of law? Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S. Ct. 2100, 60 L.Ed.2d 668 (1979).

In response to the first question a convicted person does not have a constitutional or inherent right to be conditionally released before expiration of a valid sentence. Greenholtz v. Nebraska Penal Inmates, supra, U.S. at 7, S.Ct. at 2103, L.Ed.2d at 675. It is the use of mandatory language which creates a presumption that a parole release date will be set. Board of Pardons v. Allen, - U.S. -, 107 S.Ct. 2415, 96 L.Ed.2d 303, 313 (1987).

Under contemporary California case law concerning parole release, it has been said that:

> "The BPT's discretion in parole matters has been described as '"great"' (Falk, The Supreme Court of California 1971-1972 (1973) 61 Cal.L.Rev. 273, 427-428) and '"almost unlimited"' (Note, The California Adult Authority (1972) 5 U.C.Davis L.Rev. 360, 368, 376-377). The BPT's exercise of its broad discretion '"involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interest of the inmate and of the public."' (Fain I, supra, 65 Cal. App.3d at p. 389.) ... A prison inmate has no vested right in his prospective liberty on a parole release date. (Fain I, supra, 65 Cal.App.3d at p. 390 [1976]; see In re McLaim, supra, 55 Cal.2d 78, 87 [1960].)". In re Powell, 45 Cal.3d 894, 248 Cal.Rptr. 431, 436, 755 P.2d 881 (1988), vacating prior decision at 42 Cal.3d 1075, 232 Cal.Rptr. 553, 728 P.2d 1188 (1986).

However, the claim that California life term prisoners have a protectable expectation of release on parole under the criteria set forth by this Court in Greenholtz v. Nebraska Penal Inmates and Board of Pardons v. Allen have been raised in the state courts, no published decision from any state court has addressed this

matter directly.[4] In this light, the petitioner submits that the California Supreme Court holding in Powell rests soley upon interpretations of the law as they existed prior to the enactment of the DSL and its logical and legal validity is therefor suspect.

Two leading California Supreme Court cases dealing with the interest of the ISL indicate that:

> "In the general field of criminal law the legislature has abandoned the ancient notion of catagorical punishment, the infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the jugdment of the period of incarceration. The Authority does not fix that period of incarceration pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual analyzed as a human

4. Besides raising this federal question on his own behalf in the state courts, the petitioner also presented this issue to the California Supreme Court when he appeared in the Powell case as amicus curiae on behalf of the respondent prisoner.

> composite of intellectual, emotional and genetic factors." People v. Morse, 60 Cal.2d 631, 642-643, 36 Cal.Rptr. 201, 388 P.2d 33 (1964).
>
> "Service of an arbitrarily fixed term which has relation to the matter of punishment cannot of itself furnish a proper or just standard by which it may be fairly determined whether or not a prisoner has repented of his crime and evidenced a disposition to redeem himself, and may with safety to society be granted a parole under which to atain complete reformation ...." Roberts v. Duffy, 167 Cal. 629, 634, 140 P. 260 (1914).

A proper analysis of the superseding DSL statutes, however, demonstrates that the length of punishment is now intended to fit the crime instead of the ISL scheme of making the punishment fit the criminal.

> "Before 1976, California was famous or notorious as the state whose law seemed most thoroughly committed to the idea that sentences should be indeterminate. The laws implied or said that the length of imprisonment should depend more on the individual characteristics of the criminal than on the nature of the crime; maximum discretion over length of sentences should be given to an administrative agency shielded from public accountability; the purpose of imprisonment is to rehabilitate the offender and

> to protect society from his further misdeeds, and the released prisoner should be subject to a lengthy period of parole supervision to protect the public and to ensure his rehabilitation. The Uniform Determinate Sentencing Act of 1976, commonly known in the state as S.B. (Senate Bill) 42, seems to be based on the opposite assumptions in every respect." Sheldon L. Messinger, J.D. and Phillip E. Johnson, J.D., "California Determinate Sentencing Statute: History and Issues," Determinate Sentencing: Reform or Regression?, Special Conference Report, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Dept. of Justice, March 1978, pp. 13-14.

Prior to the enactment of the DSL, the only statutory language particularly relevant to the determination of a prisoner's release on parole was, by far, very general in nature:

> "In any case the matter of parole may be determined by the Adult Authority." Cal. Stat. 1971, ch. 1732, § 2; see former Cal. Pen. Code § 3041(a) (1971).

And the Adult Authority:

> "May parole prisoners in a state prison...." Cal. Stat. 1957, ch. 2256, § 57; see former Cal. Pen.

Code § 3040 (1957).

Under the DSL, however, there is a presumption that:

> "The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public". Cal. Pen. Code § 3041(a) (1986).

During the ISL reign, the legislature had provided no standards or criteria by which the Adult Authority was to be guided in carrying out its sentencing and paroling functions. The only statutory limitation on the determinative powers of the former Adult Authority were that the term of imprisonment must not exceed the maximum nor be less than the minimum term prescribed by law. It is apparent by this change in language that a presumption has been created that the legislature, in enacting the DSL, intended to provide limiting standards and criteria by which the paroling authorities were to be guided

in determining the actual length of imprisonment to be served and that:

> "The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime." Cal. Pen. Code § 3041 (1986).

If any principle may be gleaned from these presumptions, it is that a significant similarity exists between the Nebraska statutes in Greenholtz v. Nebraska Penal Inmates (where the Board of Parole "shall" order parole release "unless it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantial adverse effect on institutional discipline; or (d) His continued correctional treatment, medical

care, or vocational or other training in the facility will substantially enhance his capacity to lead a law abiding life when released at a later date." Neb. Rev. Stat. § 83-1,114(1) (1981)), the Montana Codes in Board of Pardons v. Allen (where "the board shall release on parole ... any person confined ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[,] ... for the best interests of society and not as an award of clemency or a reduction of sentence or pardon ... [and] only when the board believes that he is able and willing to fulfill the obligations of a law abiding citizen." Mont. Code Ann. § 46-23-201 (1985)) and the California scheme where:

> "One year prior to the inmate's minimum eligible parole release date ... Board of Prison Terms ... shall normally set a parole release date.... In a manner that will

> provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public ... unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Pen. Code § 3041 (1986).
>
> "The board shall hear each case annually thereafter, except the board may schedule the next hearing no later that (A) two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year ... (B) three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years". Cal. Pen. Code § 3041.5 (1986).

The California statutes, like the Nebraska and Montana statutes, used mandatory language to create a presumption that

parole release will be granted. In addition, the legislative history further supports the conclusion that the DSL statutes significantly changed the nature of discretion to be enjoyed by the Board of Prison Terms.

Unlike the subjective and predictive ISL background of both the Nebraska and Montana codes, however, the release decision under the California statutes is to be guided by the goals of the DSL where disparate terms are the very evil to be checked. The DSL also added a provision against the practice of "requiring, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." Cal. Stat. 1976, ch. 833, § 2; Cal. Stat. 1979, ch. 255, § 46; Cal. Pen. Code § 5011. Therefore providing a further indication of the legislative intent to divert and lessen the discretion of the state's paroling authority.

Having in mind the facts and circumstances as they now appear a strong case exists that the Board of Prison Terms does not possess the broad discretion enjoyed by its predecessor the Adult Authority; and if any discretion remains at all, it has been limited to the actual determination of the uniform terms for offenders committing the same offenses under similar circumstances and whether the length of imprisonment should be inexorably fixed early or late during said term.

Accordingly, the current California parole release statutes establish a fundamental liberty interest sufficient to bring into play the protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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2. California Official Administrative Regulations Violate Concepts of Due Process of Law by Risking the Continual Incarceration of Life Term Prisoners Beyond the Uniform Terms Established for Offenses of Similar Gravity and Magnitude.

The petitioner contends that provisions of §§ 2280, 2281 and 2282 of the California Code of Regulations violate established concepts of due process guaranteed by the Fourteenth Amendment to the United States Constitution.

Once a fundamental interest is identified, the nature of protection from loss due "depends on the extent to which an individual will be '"condemned to suffer a grevious loss"'". Morrissey v. Brewer, 408 U.S. 476, 481, 92 S.Ct. 2593, 33 L.Ed. 2d 484, 494 (1972).

> "The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions." Greenholtz v. Nebraska Penal Inmate, supra, U.S. at 13, L.Ed.2d, at 679.

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society. Rochin v. People of California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183, 190 (1952). This clause requires that action of state through any of its agencies must be consistent with fundamental priciples of liberty and justice which lie at the base of our civil and political institutions. Buchalter v. People of New York, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943).

When certain fundamental rights are involved, regulations limiting these rights may be justified only by a compelling state interest and the legislative

enactments must be narrowly drawn to express only legitimate state interests at stake. Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147, 178, reh. den. 410 U.S. 959, 93 S Ct. 1409, 35 L.Ed.2d 694 (1973).

The questioned regulations require that:

> "A parole date shall be denied if the prisoner is found to be unsuitable for parole under § 2281(c)." Cal. Code of Regulations § 2280 (1979).
>
> "The panel shall first determine whether a prisoner is suitable for release on parole. Regardless of the length of time served, a life term prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code of Regulations § 2281(a) (1980).
>
> "The panel shall set a base term for each life prisoner who is found suitable for parole." Cal. Code of Regulations § 2282(a) (1980).

This form of regulation creates an administrative procedure which runs the risk of keeping life term prisoners incarcerated

beyond the uniform terms established by the appropriate matrix of base terms provided for in subparts (b) and (c) of § 2282. Supra at pp. 12-13.

The petitioner contends that these regulations severely limit the prisoners' fundamental rights to liberty and express an illegitimate state interest. Should the Board of Prison Terms decide to find the prisoner suitable for relase later instead of early during the prisoner's term of incarceration, the degree of risk of exceeding the prisoner's nondisparate release date would obviously increase the closer the prisoner came to completing his uniform term. Once the prisoner has served the term considered uniform for offenders committing the same offense under similar circumstances, the chance of losing this nondisparate release date is ensured and no longer in the realm of probability.

Under their own regulations the Board of

Prison Terms can only determine a prisoner's "total life term" (§ 2289) after setting "a base term for each life prisoner who is found suitable for release" (§ 2282). If the Board of Prison Terms continues to find the prisoner unsuitable for release the prisoner's uniform parole release date will never be determined. This scheme is consistent with the goal of rehabilitation where:

> "To probe a person's psyche and to predict his future behavior is always an awesome task, and the opimistic belief that one can discern a person's general propensity for law observance from his regimented conduct in a prison now seems remarkably naive.... The principal practical effect of our emphasis on '"cure"' has been to encourage convicts to view their time in prison as an exercise in theater. They '"volunteer"' for group thearapy and other rehabilitative programs, and even find Christ and become guinea pigs for medical experimentation in hypocritical efforts to curry favor with parole boards. In addition, we have become increasingly aware that the very indeterminacy of indeterminate sentences is a form of psychological torture." (Footnotes omitted.) Albert W. Alschuler, J.D.,

"Sentencing Reform and Prosecutorial Power: A Critique of Recent Prospects for 'Fixed' and 'Presumptive' Sentencing," Determinate Sentencing: Reform or Regression?, supra, at pp. 60-61.

Either the length of punishment should fit the crime (DSL) or the length of punishment should depend upon the adjustment and social rehabilitation of the prisoner (ISL). As it is noted above, however, the California Legislature has expressed the current goal of punishment to be "best served" by providing uniform terms for "offenders committing the same offense under similar circumstances." §1170(a)(1).

> "Disparity is condemned for a variety of reasons. First and foremost, it is unjust for persons who have similar criminal histories, and who have committed essentially the same criminal act, to receive widely dissimilar punishments. Some believe that disparity results in sanctions which are too lenient, whereas others fear that it leads to sentences which are too severe. All agree, however, that disparity lessens faith in the entire judicial system. In addition, many people, including prison administrators, believe that disparity may breed

> more crime by arousing the anger of offenders against society. The perception of having been treated unjustly is thought to be one of the causes of prison riots and of residivism." "Sentencing: Correcting Disparity," Encyclopedia of Crime and Justice (The Free Press, New York, 1983), Vol. 4, p. 1453.

A legitimate state interest cannot be established by discredited goals of rehabilitation and the Board of Prison Terms, therefore, cannot have it both ways. Moreover, it is unreasonable for the state to shift between these two diverse and conflicting goals on a case by case basis.

Accordingly, the current California parole regulations violate concepts of due process of law by risking the continual incarceration of life term prisoners beyond the terms considered uniform and just.

CONCLUSION

Based on the foregoing, there can be no question that the California Supreme Court

has decided parole rights issues in a manner which conflicts with the applicable decisions of this Court in Greenholtz v. Nebraska Penal Inmates and Board of Pardons v. Allen. A Writ of Certiorari should issue to address this important federal question and its secondary issue of what process is now due to minimize the risk of setting disparate terms for life prisoners.

Dated this 1st day of October, 1988.

Respectfully submitted,

Martin K. Maurer

MARTIN K. MAURER
PETITIONER
In Propria Persona
CORRECTIONAL TRAINING
FACILITY

STATE OF CALIFORNIA—YOUTH AND ADULT CO...CTIONAL AGENCY GEORGE DEUKMEJIAN, Governor

BOARD OF PRISON TERMS
545 DOWNTOWN PLAZA
SUITE 300
SACRAMENTO, CA 95814

916/322-6729

April 4, 1986

MR. MARTIN K. MAURER, C-02917
Correctional Training Facility
P. O. Box 705/LB-302
Soledad, CA 93960-0705

RE: Petition To Amend California Administrative Code

Dear Mr. Maurer:

The above referenced petition which requests the Board of Prison Terms to amend its rules to provide for the setting of terms for prisoners who have not been found suitable for parole has been received and reviewed by the Board.

In reviewing your petition, the Board finds no basis to exercise its rulemaking authority with respect to your request. Your request is denied.

You object to 15 California Administrative Code (CAC) §§2280-2282 setting forth Board procedures for finding lifer parole suitability and fixing terms. You specifically object to 15 CAC §2281 which provides in part that in lifer parole suitability hearings "the panel shall first determine whether a prisoner is suitable for release on parole", contending that Penal Code §3041 as amended in 1976 requires the panel to first set a date for release "...unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."

The enumerated rules are consistent with the mandate of the statutes under which they were promulgated.

Penal Code §3041 subdivision (a) provides in part as to life prisoners a panel shall meet with the prisoner "...and shall normally set a parole release date as provided in Section 3041.5." That section sets forth procedures and rights of the prisoner at the hearing.

Penal Code §3041, subdivision (b) provides in full as follows:

> (b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that the consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

15 CAC §§2080-2082 comply with the statutory scheme. Section 3041 subdivision (a) provides the panel shall normally set a parole release date. However, §3041 subdivision (b) requires it to set the date unless the condition specified is found.

15 CAC §2281 requiring the panel to first determine suitability citing public safety considerations complies with that mandate. If the panel believes the prisoner "...will pose an unreasonable risk of danger to society if released from prison", in accordance with the statutory mandate it cannot set a parole date.

While the analysis in your petition is also consistent with the relevant statutory provisions, the Board adopted regulations are consistent and were properly adopted.

We apologize for the delay in response. In each case your correspondence to the Board took at least two additional weeks to be referred to me.

Very truly yours,

JAMES A. BROWNING, JR.
Staff Counsel

cc: Ron E. Koenig
David E. Brown

FILED

Oct 14 10 37 AM 1986

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

In the Matter of

MARTIN K. MAURER,

Petitioner,

For Writ of Habeas Corpus.

CASE NUMBER
HC 1867

ORDER

It appearing that a Petition for Writ of Habeas Corpus has been filed herein, and good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

☐ Public Defender/ _____ is appointed to represent petitioner.

☐ Order to Show Cause to issue, returnable on _____, at _____.

☐ Hearing on Order to Show Cause is set for _____, at _____.

☐ To investigate the allegations of the petition and report to the Court, hearing set for _____, at _____.

☒ Petition for Writ of Habeas Corpus is denied for the following reasons:

The Petitioner has performed an impressive job in assembling judicial decisions dealing with indeterminate sentenced inmates and the setting of parole dates. Unfortunately, none of the cited cases support Petitioner's conclusion of constitutional infirmity, nor do they support the drastic relief sought by Petitioner.

In addition, In re Duarte 143 CA 3d 943, and In re Seabock 140 CA 3d 29 are clearly contrary to Petitioner's position.

Dated: October 14, 1986.

JUDGE OF THE SUPERIOR COURT
JOHN A. PHILLIPS

Copy to: Petitioner/Attorney

MARTIN K. MAURER C-02917
P.O. Box 705-LB-302
Soledad, CA 93960-0705

CLERK 133.3 (REV. 8/82)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

COPY

in and for the

SIXTH APPELLATE DISTRICT

FILED

FEB 11 1987

Court of Appeal - Sixth App. Dist.

BY _____

DEPUTY

MARTIN K. MAURER,
On habeas corpus.

DENO. H002747

Superior Court No. _____

BY THE COURT

The petition for writ of habeas corpus is denied because (1) the present legislative and administrative criteria for determining parole release dates for prisioners serving life sentences have been determined to be valid (In re Duarte (1983) 143 Cal.App.3d 943; In re Seabock (1983) 140 Cal.App.3d. 29; see also In re Jackson (1985) 39 Cal.3d. 464, 473); and (2) petitioner states no specific facts showing he has been arbitrarily or illegally denied parole.

(Brauer, Acting, P.J., Capaccioli, J. and Longinotti, J. (assigned) participated in this decision.)

Dated FEB 11 1987

BRAUER, J. ACTING P.J.

ORDER DENYING WRIT OF HABEAS CORPUS

No. S002196

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARTIN K. MAURER

ON

HABEAS CORPUS

SUPREME COURT
FILED
AUG 10 1988
Clerk

Petition for writ of habeas corpus DENIED.

Chief Justice

APPENDIX D.

STATE OF ILLINOIS)
) ss.
COUNTY OF MCDONOUGH)

DECLARATION OF SERVICE BY MAIL

I, Virginia Maurer, declare and state as follows: I am over 18 years of age, and not a party to the within cause; my address is 1701 S. Madison St., Macomb, Illinois 61455; I served three copies of the attached PETITION FOR WRIT OF CERTIORARI on the following, by placing same in an envelope addressed as follows:

Ron E. Koenig, Chairman
State of California
Board of Prison Terms
545 Downtown Plaza, Suite 200
Sacramento, CA 95814

Said envelope was then, on Oct. 1, 1988, sealed and deposited in the United States mail at Macomb, Illinois, the county of which I reside, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of October, 1988.

Virginia Maurer
Virginia Maurer